In The

Supreme Court of the United States

October Term, 1976

No. 76-78

BALTIMORE AND ANNAPOLIS RAILROAD COMPANY AND ELMER J. JUBB,

Appellants Below and Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION AND ALCO-GRAVURE, INC.,

Appellees Below and Respondents.

BRIEF OF ALCO-GRAVURE, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May a rail carrier, without first obtaining Interstate Commerce Commission approval, abandon rail operations by refusing to repair damage to its facilities caused by a conscious policy of deferred maintenance which permitted a hurricane to render its line inoperable, when the carrier had sufficient funds available to make such repairs, other than funds derived from non-rail operations?

STATEMENT OF THE CASE

A petition for a writ of certiorari was filed by respondent Alco-Gravure, Inc. ("Alco") on July 17, 1976 relating to a companion appeal in the United States Court of Appeals for the Fourth Circuit.

On June 23, 1972 petitioner Baltimore and Annapolis Railroad Company's ("B&A") six mile railroad line between Baltimore and Glen Burnie, Maryland, which served Alco's printing plant, was rendered inoperable. The underlying cause was an unsafe track condition resulting from B&A's longstanding, conscious policy of deferring maintenance on its line; the immediate cause was Hurricane Agnes (Pet. App. 9a, 17a, 21a).[1] B&A could have immediately repaired this damage and restored service to Alco at a cost of about $84,000 (Pet. App. 10a).

Although Alco made due demand, B&A refused to restore rail service. Nor did it file an application to abandon operations before the Interstate Commerce Commission ("Commission") until seven months later; and it did so then largely as a response to a complaint filed before the Commission by Alco seeking an order requiring B&A to restore service (Pet. App. 13a).

Prior to the hearing below on respondents' claims for injunctive relief, B&A had various options available to finance the $84,000[2] expenditure necessary to restore rail service to Alco, none of which it pursued. The simplest solution for B&A, without having to deplete its existing cash, would have been to obtain federal assistance under the Emergency Rail Facilities Restoration Act, Pub. L. No. 92-591, 86 Stat. 1304 (1972), enacted by Congress specifically to aid railroads which suffered

1. References to the Appendices annexed to petitioners' petition for a writ of certiorari are cited as "Pet. App." followed by the appropriate page number.

2. This figure increased to $162,000 in 1975 due to inflation and further deterioration since B&A had made no repairs in the interim (Pet. App. 10a).

damage to their facilities as a result of Hurricane Agnes. B&A refused to apply for assistance under this act (Pet. App. 12a). Alternatively, it could have used the more than $100,000 net profit it had recently realized from the sale of portions of its right-of-way (JA 227, 233-234).[3] Or it could have used a portion of its $600,000 in cash and temporary investments or $900,000 in net surplus then available (JA 224, 312).

Although petitioners disregard B&A's strong financial resources and say in their petition that B&A had "no funds from its rail operation which operated [at] a deficit for years" to finance the repairs necessary to restore service to Alco, it was unable to support this claim below with any evidence and the District Court did not so find. The only other business B&A conducted from which it could have amassed its available funds was a bus operation which operated under a certificate of public convenience and necessity issued by the Commission. In regard to the source of B&A's available funds, its witness gave the following testimony:

> "Q. Mr. Disharoon, have you ever conducted a study of the net profits from rail operations, bus operations, from land sales or whatever, from 1935 to the present to determine what ratio of the earned surplus can be applied to rail operations? A. No, I haven't" (Cross-examination) (JA 226-227).

Further, petitioners' assertion that the B&A rail business was a deficit operation is without record support. To the contrary, the evidence below indicated that for the period since 1969, when B&A constricted its rail operations to the six mile portion of its line over which restoration of service was sought and ordered below, it operated at a profit except for one year when it was faced with a labor strike (JA 213-217, 306).

3. References to the joint appendix before the Court of Appeals are cited as "JA" followed by the appropriate page number.

Accordingly, the only finding the court below was able to make was that "B&A claims a net loss in its railroad operations of $68,000 over the 10-year period preceding its cessation of service to the Alco plant in 1972. B&A's sound financial position has not therefore resulted from the profitability of its rail operations in *recent years*" (emphasis supplied) (Pet. App. 12a).

On April 29, 1975 the District Court rendered its opinion in which it found that B&A unlawfully abandoned rail operations serving Alco in violation of Section 1(18) of the Interstate Commerce Act ("Act"), 49 U.S.C. §1(18) (1959). On April 19, 1976 the Court of Appeals affirmed *per curiam*.

On April 26, 1976 the Court of Appeals denied petitioners' motion for a stay of the mandate requiring B&A to restore service to Alco. On May 6, 1976 this Court by The Chief Justice denied petitioners' further application for a stay of the mandate of the Court of Appeals pending petitioners' application to this Court for a writ of certiorari.

Thereafter, on May 26, 1976 the Commission denied B&A's application insofar as it sought to abandon operations which served Alco.[4] Commission Docket No. AB-71. B&A has not sought review of this decision.

In a series of bi-weekly reports filed by petitioners pursuant to the order of the District Court, the last of which was petitioners' report of July 26, 1976, petitioners have represented that they have been progressing towards full compliance with the court's order and will complete the repairs necessary to restore rail service over the contested six mile rail line by August 21, 1976.

4. Petitioners state that this decision was delayed inordinately. However, it was not until June 9, 1975 that B&A sought expedition of the Commission's decision. Nor did B&A ever seek expedition of the issuance of the Commission's draft environmental impact statement which must precede its decision.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

(1) The question presented will be rendered moot on August 21, 1976 because by that date petitioners will have complied fully with the injunction order sought to be reviewed.

(2) The question presented was not raised in the District Court and was raised without any evidentiary basis for the first time in the Court of Appeals.

(3) Petitioners failed to present evidence in the District Court to establish that B&A had no funds from its rail operation to finance restoration of service to Alco or that the B&A rail business was a deficit operation and the District Court made no such findings. Accordingly, there is no evidentiary basis to support the Fifth Amendment claim now asserted by petitioners.

(4) Even if the facts asserted in petitioners' petition were correct or had an evidentiary basis, the Court of Appeals decision did not conflict with this Court's decision in *Brooks-Scanlon Co. v. Railroad Commission,* 251 U.S. 396 (1920). Rather, the decision of the Court of Appeals would have been mandated by this Court's decision in *Broad River Power Co. v. South Carolina,* 281 U.S. 537 (1930) and *Fort Smith Light & Traction Co. v. Commissioners,* 267 U.S. 330 (1925), and Section 1(18) of the Act.

Section 1(18) of the Act specifies that a carrier may not abandon operations until *after* authorization is obtained from the Commission. B&A did not even seek such authorization until long after it abandoned operations. The *Brooks-Scanlon* decision is not apposite, for the doctrine established therein applies only *after* a regulated carrier is denied permission to abandon operations by its regulatory authority. Even then the doctrine can be raised only on review of the order of the regulatory authority. This was the case in *Brooks-Scanlon,* 251

U.S. at 400. As has been stated in *In re Central Railroad Co. of New Jersey,* 485 F.2d 208, 214 (3 Cir. 1973), *cert. denied,* 414 U.S. 1131 (1974), *Brooks-Scanlon* did not hold that a carrier may abandon operations and by-pass prescribed federal administrative procedures by merely alleging a Fifth Amendment claim. Thus, the only proper place for petitioners to raise a *Brooks-Scanlon* defense would be on appeal from the Commission's order denying the B&A abandonment application.

Further, this Court's decision in *Broad River Power Co., supra,* specifically indicated that the decision in *Brooks-Scanlon* held only that where a railroad serving the public is owned by a corporation which also conducts a *private* business, it is the railroad business and not the corporation's entire business which determines whether the railroad may be abandoned as unprofitable. There this Court also indicated that the *Brooks-Scanlon* doctrine is *not* applicable to a corporation, such as B&A, which operates two regulated businesses both under public franchises granted by the same authority. 281 U.S. at 544. This Court further held in *Fort Smith Light & Traction Co., supra,* that in the public interest such a regulatory authority can require that funds of one regulated business be used to support the other.

CONCLUSION

The Court should not grant the writ of certiorari sought by petitioners.

Respectfully submitted,

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Dated: New York, New York
August 12, 1976